87-975

Supreme Court, U.S.
FILED
OCT 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES

_____ **TERM, 1987**

GENE SCROGGY, *et al., Petitioner,*

v.

DANIEL C. SUMMERS, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BARBARA W. JONES,
Counsel of Record
Corrections Cabinet
Office of General Counsel
State Office Building
Room 500
Frankfort, Kentucky 40601
502/564-2024

October 12, 1987

38pgs

QUESTIONS PRESENTED

1. Whether a parolee's due process rights are violated when recommitment of the parolee to prison on a new felony sentence received for commission of a crime while on parole automatically terminates his parole status on any sentence on which he has not received a final discharge, or a restoration of civil rights, prior to the date of recommitment?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were the Petitioner, Daniel C. Summers, and the Respondents, Gene Scroggy, et al.

The Respondents before this Court include Kennedy, Nelson, and Weber.

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Kentucky Revised Statute 439.352 2,4,8

No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____ **TERM, 1987**

_____

GENE SCROGGY, *et al., Petitioner,*

v.

DANIEL C. SUMMERS, *Respondent*

_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

_____

The Petitioner, Gene Scroggy, et al, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on July 31, 1987.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit entered on August 31, 1987 not recommended for full-text publication is reprinted in the Appendix hereto, page A-1, infra. The Order of Dismissal and Magistrate's report of the

United States District Court for the Western District of Kentucky at Louisville (Edward H. Johnstone) is reprinted in the Appendix hereto, page B-1, infra.

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit declaring Kentucky's statute unconstitutional was entered on August 31, 1987. See page A-1, infra. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

The statute whose construction is here at issue is Kentucky Revised Statute 439.352 which states:

> "Recommitment of a parolee to prison on a new sentence received for commission of a crime while on parole shall automatically terminate his parole status on any sentence in which he has not received a final discharge, or a restoration of civil rights prior to the date of recommitment. The prisoner shall, at the time of the recommitment on the new sentence, begin to accrue additional time credit toward conditional release or expiration of sentence on the sentence on which he had previously been paroled unless he has

been finally discharged from parole on the sentence or has been restored his civil rights prior to the date of the recommitment."

STATEMENT OF THE CASE

Respondent filed a pro se Petition for a Writ of Habeas Corpus in the United States District Court for the Western District of Kentucky at Louisville. His Petition for a Writ of Habeas Corpus was ordered filed by Order of United States Magistrate W. David King on June 10, 1986. Respondent contended in his Petition for a Writ of Habeas Corpus that he was being unlawfully incarcerated at the Kentucky State Penitentiary near Eddyville, Kentucky. Specifically, he alleged that his parole status was illegally revoked by the Kentucky Parole Board. Respondent contended that the revocation of his parole status, based upon his recommitment to state custody for new felony crimes committed while on parole, denied his right to due process of law. He also alleged that the Kentucky Parole Board impermissibly revoked his parole status when in fact the Respondent's obligations under that parole had been satisfied and the parole was, in effect, non-existent. Thereafter, the Petitioners filed an Answer to the Petition for Writ of Habeas

Corpus and tendered a Motion to Dismiss. The United States Magistrate entered an Order directing that the parties expand the record to include documentation concerning Respondent's final discharge from parole and copies of the relevant statutes or regulations outlining the procedures and requirements for the granting of final parole discharge. Both parties filed their supplementations to the record per the Magistrate's earlier Order requesting such supplementation. Thereafter, the Magistrate entered his recommendation to the District Court Judge that the Petition for a Writ of Habeas Corpus be dismissed. Respondent filed Exceptions to the Magistrate's Report and Recommendation. The District Court adopted the Findings and Recommendations of the Magistrate and dismissed the case. Respondent then filed Notice of Appeal to the Sixth Circuit Court of Appeals from the District Court's Order of Dismissal and denial of Respondent's Petition for a Writ of Habeas Corpus.

The Sixth Circuit Court of Appeals held Kentucky Revised Statute 439.352 unconstitutional. The Court held that Kentucky's statute violated Respondent's due process rights to a hearing. The Court vacated the District Court's Judgment on that particular issue and remanded for the Order of a revocation

hearing in Respondent's case within a reasonable time.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant The Writ To Resolve A Conflict Among The Circuits.

The Sixth Circuit's decision that states are prohibited from automatically revoking parole without giving the parolee a final hearing, even if the revocation was predicated on the parolee's conviction of a felony committed while on parole, is in direct conflict with a recent Fifth Circuit decision on the same issue. In *Pickens v. Bulter*, 814 F.2d 237 (5th Cir. 1987), the Court held when state law prescribes mandatory revocation of parole upon a parolee's conviction of another crime, the state is not required to give such a parolee a final revocation hearing.

The Sixth Circuit bases its decision on the holding in *Morrissey v. Brewer*, 408 U.S. 471, 487-488 (1972). The Sixth Circuit held that *Morrissey, supra,* requires that all parolees be given a final hearing prior to parole revocation. However, as *Pickens, supra,* correctly held, and as the Supreme Court has held in *Black v. Ramano*, 471 U.S. 606, 105 S. Ct. 2254, 85

L.Ed.2d 636 (1985), *Morrissey, supra,* did not consider the hearing requirements of "a revocation hearing proceeding in which the fact-finder was required by law to order incarceration upon f ding that the defendant has violated a condition of ... parole". *Id.* at p. 612.

The Sixth Circuit's decision is directly at odds with the better reasoned Fifth Circuit decision. *Pickens, supra,* relying on *Black, supra,* should be the law for all lower courts. As such, consideration of the matter by this Court is essential.

II. The Decision Below Declaring State Law Unconstitutional That Prescribes Manadatory Revocation of Parole Upon a Parolee's Conviction of a New Felony Crime Raises Important And Unresolved Problems.

The Sixth Circuit has held that states are prohibited from automatically revoking parole without giving the parolee a final hearing, even if the revocation was predicated on the parolee's conviction of a felony committed while on parole. As previously stated, the Court bases its ruling on the teaching of *Morrissey v. Brewer, supra.* In *Morrissey,* the Supreme Court held that a parolee's liberty "is valuable and must be seen as within the protection of the Fourteenth Amendment" and that its

termination required "some orderly process, however informal". *Id.* at p. 482. The Court required this informal process "to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior". *Id.* at p. 484. *Morrissey, supra,* also required the state to conduct a final revocation hearing within a reasonable time after the parolee is taken into custody. The purpose of this hearing is to give the parolee an opportunity to show that he did not violate parole conditions or if he did, that the violation does not warrant revocation. *Id.* at p. 488.

However, *Morrissey* does not prohibit states from imposing a mandatory, automatic revocation of parole if the parolee is convicted of a new felony. As previously stated, in *Black v. Ramano, supra*, the Supreme Court held that *Morrissey, supra,* did not consider the hearing requirements of "a revocation hearing proceeding in which the fact-finder was required by law to order incarceration upon finding that the defendant had violated a condition of ... parole". *Id.* at p. 612. "Thus, the Court's discussion of the importance of the informed exercise of discretion did not amount to a holding that the fact-finder in a revocation hearing must, as a matter of due process, be granted

discretion to continue ... parole". *Id.* at p. 643.

As pointed out by the Fifth Circuit in *Pickens, supra,* "our reading of *Black* persuades us that the Court in *Morrissey* did not hold that a state is prohibited from declaring that parole will be automatically revoked for serious violations such as conviction of a felony. *Black* also teaches that it is only when the fact-finder has discretion to continue parole that the parolee is entitled to show an excuse for the violation or that revocation is not appropriate". *Id.* at p. 239.

In *Pickens, supra,* as in this case, if state law mandates parole revocation on new felony convictions and if there is no discretion to continue parole, the parole board should not be required to give a final revocation hearing. Clearly, Kentucky Revised Statute 439.352 does require revocation following a new felony conviction and the parole board has no discretion to continue parole.

For obvious reasons, this should be the proper reading of the law. If a court of competent jurisdiction has determined after hearing any and all mitigation that the parolee has to offer that sufficient evidence exists to prove beyond a reasonable doubt that the parolee is guilty of committing a new felony, then there is certainly sufficient evidence, namely, the new felony conviction

records, to establish that the parolee has violated the terms of his parole by receiving the new conviction. While *Morrissey, supra,* fails to prescribe the standard of proof which due process requires in probation and parole final revocation hearings, it does suggest that guilt beyond a reasonable doubt, the test used in criminal trials, is not necessary. The Court stated:

> "The state has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole." *Id.* at p. 483. "We emphasize there is no thought to equate the second stage of parole revocation to a criminal prosecution in any sense." *Id.* at p. 489.

Respondent's right to due process of law was satisfied in the Circuit Court proceedings which resulted in his recommitment to state custody. This was a condition precedent to the revocation of Petitioner's parole under the Kentucky statute that the Sixth Circuit has declared unconstitutional. Respondent was provided in those proceedings with all the minimum requirements of due process that is required by *Morrissey, supra.* The Court in *Black, supra,* stated:

> Neither *Gagnon* nor *Morrissey* considered a revocation proceeding in which the fact-finder was required by law to order incarceration upon finding that the defendant had violated a condition of probation or parole. Instead, those cases involved administrative proceedings in which revocation was at

> the discretion of the relevant decision-maker. See *Morrissey,* 408 U.S., at 475, 33 L.Ed.2d 484, 92 S. Ct. 2593; *Id.,* at 492-493, 33 L.Ed.2d 484, 92 S. Ct. 2593 (Douglas, J., dissenting in part); Wis. Stat. Ann, §5703 (1957) (statute involved in *Gagnon*). Thus, the Court's discussion of the importance of the informed exercise of discretion did not amount to a holding that the fact-finder in a revocation proceeding must, as a matter of due process, be granted discretion to continue probation and parole. *Id.* at p. 643.

The lower courts need guidance from this Court in determining the applicability of *Morrissey, supra,* to state statutes that impose a mandatory, automatic revocation of parole if the parolee is convicted of a new felony committed while on parole. The Court in *Black, supra,* held that *Morrissey, supra,* did not hold that a state is prohibited from declaring that parole will be automatically revoked for serious violations such as conviction of a felony. According to *Black, supra,* it is only where the fact-finder has discretion to continue parole that the parolee is entitled to show an excuse for the violation or that revocation is not appropriate.

CONCLUSION

In view of the foregoing, a Writ of Certiorari should issue to the United States Court of Appeals for the Sixth Circuit, so that

this Court may resolve the important issue raised in this Petition.

October 12, 1987

Respectfully Submitted,

BARBARA W. JONES
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Office of General Counsel
State Office Building
Room 500
Frankfort, Kentucky 40601
Telephone: 502/564-2024

APPENDIX A

OPINION OF THE COURT OF APPEALS

July 31, 1987

BEST AVAILABLE COPY

No. 87-5064

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

July 31, 1987

DANIEL C. SUMMERS,
Petitioner-Appellant,

v.

GENE A. SCROGGY and ATTORNEY GENERAL OF KENTUCKY,
Respondents-Appellees.

ORDER

Before: Kennedy and Nelson, Circuit Judges; and Weber, District Judge.*

The petitioner moves for counsel on appeal from the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. §2254. This appeal has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. After an examination of the record and the briefs, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

The petitioner is a Kentucky state prisoner. He challenges the Kentucky Parole Board's imposition of the remainder of his two concurrent life sentences. He raises *ex post facto* clause and

due process issues. He exhausted his state remedies.

The district court relied upon a 1980 Kentucky parole regulation when deciding the *ex post facto* clause issue. 501 Ky. Admin. Reg. 1:015. Because the petitioner was convicted in 1966 and was released from active parole supervision in 1975, we conclude that the application of the 1980 regulation would raise a serious *ex post facto* clause issue. *Weaver v. Graham,* 450 U.S. 24, 31 (1981). Therefore, we will not affirm the district court's decision of this issue on the basis of the 1980 regulation.

However, the district court's decision on this issue can be affirmed on another ground. *Russ' Kwik Car Wash, Inc. v Marathon Petroleum co.,* 772 F.2d 214, 216 (6th Cir. 1985). The applicable parole regulation was enacted in 1975. The issue then becomes whether this state law creates a liberty interest. *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex,* 442 U.S. 1, 7 (1979). The language in the 1975 regulation states:

> The Director of the Division of Probation and Parole reserves the right to refuse to recommend restoration of civil rights even though the above conditions have been fulfilled.

This language is not the mandatory language necessary to create a liberty interest under *Greenholtz,* 442 U.S. at 12. Therefore, the regulation in effect at the time in question in this case did not

grant a liberty interest to the petitioner concerning his final discharge from parole. So the district court's judgment on the first issue in this case can be affirmed.

The petitioner's second issue attacks Ky. Rev. Stat. §439.352 as unconstitutional. This statute automatically terminates parole when the parolee is convicted of a new crime and is sentenced to prison. The petitioner argues that this statute violates his due process rights to a hearing. *Morrissey v. Brewer,* 408 U.S. 471, 487-88 (1972). The petitioner is correct. In *Moss v. Patterson,* 555 F. 2d 137, 138 (6th Cir.) (per curiam), *cert. denied sub nom., Kette v. Moss,* 434 U.S. 873 (1977), an Ohio parole regulation did not grant a hearing to any parolee convicted of another crime. This court held that the Ohio regulation did violate the due process rights established in *Morrissey.* The court reasoned that a parolee still must be allowed the opportunity to present evidence in mitigation. 555 F.2d at 138. The court vacated the district court's denial of the petition and remanded the case to order a revocation hearing within a reasonable time.

The holding in *Moss* controls the decision in this case. Therefore, we vacate the district court's judgment on this issue and remand for the order of a revocation hearing in the petitioner's case within a reasonable time.

The motion for counsel is denied. The order of the district court is affirmed in part and vacated and remanded in part. Rules 9(b)(5) and (6), Rules of the Sixth Circuit.

ENTERED BY
ORDER OF THE COURT

ISSUED AS MANDATE: 8/31/87

COST: None

s/John P. Hehman
CLERK

* The Honorable Herman J. Weber, U.S. District Judge for the Southern District of Ohio, sitting by designation.

APPENDIX B

ORDER OF DISMISSAL AND MAGISTRATE'S REPORT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DANIEL C. SUMMERS,
Petitioner,

v. **CIVIL ACTION**

GENE A. SCROGGY,
Warden **No. C86-0485-L(J)**
Respondents-Appellees.

ORDER OF DISMISSAL

This matter was referred, pursuant to 28 U.S.C. 636, to the United States Magistrate for consideration and report on the petition for writ of habeas corpus filed by the petitioner pursuant to 28 U.S.C. 2254. The magistrate has filed his report and recommendation, to which the petitioner has filed objections.

After considering the petitioner's objections and conducting a *de novo* review of the record, the court finds that the magistrate's recommendation should be accepted.

IT IS ORDERED AND ADJUDGED:

1. The findings of fact and conclusions of law contained in the magistrate's report dated December 15, 1986 are hereby adopted by this court and incorporated into this order by

reference.

2. The petition for writ of habeas corpus is DENIED and this action is DISMISSED.

Dated: 12/31/86

s/ Edward H. Johnstone
EDWARD H. JOHNSTON,

Chief Judge

United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DANIEL C. SUMMERS,
Petitioner,

v. **No. C86-0485-L(J)**

GENE A. SCROGGY,
Warden,
Respondent.

MAGISTRATE'S REPORT

This matter is before the Court on the petition for writ of habeas corpus of the petitioner. The respondent has filed an answer to the petition and each party appears to have complied with the Order for Expansion of Record entered by the undersigned on September 26, 1986, to the best of his ability. The Magistrate has completed review of the record as a whole and submits the following report.

The petitioner is presently a resident of the Kentucky State Penitentiary, Eddyville, Kentucky. In his petition herein, the petitioner is challenging his present custody pursuant to two concurrent life sentences imposed upon him in the Jefferson Circuit Court on or about February 23, 1966. The material historical facts appear to be undisputed and are summarized

below.

As a result of his conviction of two counts of armed robbery, the petitioner was sentenced to serve two concurrent life sentences within the Kentucky Department of Corrections. According to the petitioner's Resident Record Card submitted by the respondent as an exhibit to his answer to the petitioner, the petitioner was paroled from custody by the Kentucky parole board on April 18, 1973. During the term of his parole, the petitioner gained employment and reported as directed by his parole officer. During August of 1975, the petitioner was informed by his parole officer that he no longer was required to report to the parole officer and, according to the petitioner, the officer told him that " ... from this day on you know (sic.) longer have to report to my office, you're on your own now!" On or about August 28, 1975, the Division of Probation and Parole of the Bureau of Corrections sent a letter to the petitioner. This letter informed the petitioner that he was being released from active parole. It informed the petitioner that the letter did not constitute a *final discharge* from parole and that he could terminate his liability resulting from his sentences by obtaining either his final discharge or restoration of his civil rights. He was urged to obtain one or the other as soon as he became eligible and

was told that his parole officer could assist him in obtaining either. (See exhibit C to the respondent's answer.) The petitioner admits that he did not take any affirmative steps to be released from his parole liability. See page 2 of his affidavit filed in support of his supplementation of the record filed herein on October 20, 1986. Further, the petitioner did not supply the Court with a copy of his certificate of final discharge as ordered in the Order for Expansion of Record entered on September 26, 1986.

By Judgment of Conviction and Sentence entered on February 2, 1983, in the Jefferson Circuit Court, Louisville, Kentucky; the petitioner, on a plea of guilty, was sentenced to serve a total of 10 years on 15 counts of Criminal Possession of a Forged Instrument in the Second Degree and one count of being a first-degree persistent felony offender. See Exhibit B of respondent's answer.

The petitioner was recommitted to the custody of the state department of corrections when he arrived at the Kentucky State Reformatory on March 11, 1983. (See petitioner's resident card referred to above.) On an unspecified date and several months after the petitioner had been transferred to the Kentucky State Penitentiary, the petitioner was informed that the parole on his

two life sentences had been revoked. The petitioner did not receive a hearing prior to revocation of his parole.

This Court has jurisdiction over the subject matter of this action pursuant to 28 USC 2254 and the petitioner has exhausted available state remedies as to the grounds raised herein. Both of the grounds raised herein are without merit and do not suggest that the petitioner is being held pursuant to the two life sentences in violation of his federally protected rights. Each ground shall be discussed below.

The petitioner first alleges that the revocation of his parole on the two sentences denied him his right to due process. Kentucky Revised Statutes (KRS) 439.352 provides in pertinent part as follows:

> Recommitment of a parolee to prison on a new sentence received for commission of a crime while on parole shall automatically terminate his parole status on any sentence on which he has not received a final discharge, or a restoration of civil rights, prior to the date of recommitment.

As we have stated earlier in this report, the petitioner admits that he had not received his final discharge or restoration of his civil rights. The petitioner's due process rights were satisfied by the criminal proceedings which resulted in the recommitment which was a condition precedent to the revocation of the

petitioner's parole under the statute.

Finally, the petitioner asserts that the Kentucky Parole Board revoked the petitioner's parole when in fact the petitioner's obligations under that parole had been satisfied and the parole was "non-existent (sic.)". In order to analyze the merits of this position, we need only to look at the Kentucky statutory and regulatory law. Title 501 of the Kentucky Administrative Regulations address those responsibilities and duties of the Kentucky Parole Board referred to by the petitioner in his petition. 501 KAR 1:015 provides the guidelines for the granting of final discharge after obligations of parole have been met. This regulation provides, in part, as follows:

> Section 1(2) - On sentences greater than five (5) years up to and including a life sentence, the parolee shall be entitled to a final discharge from parole upon the receipt, by the board, of a full report of the parolee's activities while on parole from the parole officer, assuming clear conduct from the date of parole release, upon service on parole of one-half (1/2) of the time remaining from his parole release date to his maximum expiration date, or ten (10) years, whichever is shorter.
>
> ...
>
> Section 2 - Upon receipt of evidence that a parolee has satisfied all requirements of Section 1 of this regulation, the chairman shall issue, or cause to be issued, a certificate of final discharge from parole.

As the petitioner was sentenced to two life sentences, he would not be eligible for a final discharge earlier than 10 years after he

was paroled.

This regulation has been promulgatd pursuant to Kentucky Revised Statutes (KRS) 439.354, et.seq. Specifically, KRS 439.356 provides:

> After final discharge has been ordered and a certificate issued by the board, or after the parolee's civil rights have been restored by an act of the governor, the parolee may not be held again for a violation of that parole.

A reading of the above regulations and statutes demonstrates that the petitioner's failure to actively seek and obtain his certificate of discharge or the restoration of his civil rights has resulted in his continuing liability under the terms of his parole. Perhaps the petitioner can take some comfort in the fact that he was not eligible for final discharge at the time of his recommitment because his date of recommitment (March 11, 1983) was 9 years, 10 months, and 23 days subsequent to his release on parole (April 18, 1983). Nevertheless, the fact that the petitioner had not been issued a certificate of final discharge as required by statute and regulation is dispositive of the petitioner's argument. Copies of the regulations and statutes referred to in this paragraph are appended to the respondent's response to the Magistrate's Order for Expansion of Record.

Based on the foregoing, the Magistrate RECOMMENDS that the petition for writ of habeas corpus herein be DISMISSED.

Dated: 12/15/86

s/ W. David King
W. DAVID KING
United States Magistrate

NOTICE

Pursuant to Title 28 USC 636, and Rule 6(e) of the Federal Rules of Civil Procedure, the parties shall have thirteen (13) days from the date of service to file written objections to the foregoing report with the Clerk of the Court. A copy shall be served on the undersigned at P. O. Box 826, Paducah, Kentucky 42001. Failure of a party to file timely objections shall constitute a waiver of the right to appeal by that party.

Date of Service: 12/15/86

s/ W. David King
W. DAVID KING
United States Magistrate

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-975

NR. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

GENE SCROGGY, et al., PETITIONER

verses

DANIEL C. SUMMERS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LIGHT ORANGE

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,
Daniel Summers 61352
DANIEL C. SUMMERS 61352
Kentucky State Penitentiary
Post Office Box 128
Eddyville, Kentucky 42038

RESPONDENT, PRO SE

CERTIFICATE OF SERVICE:
I hereby certify that a true and correct copy of the Brief in Opposition has been mailed, first class, postage pre-paid, to the Honorable Barbara W. Jones, Corrections Cabinet, State Office Building, Frankfort, Kentucky 40601, (Counsel for Petitioner) on this 19th day of November 1987, pursuant to Rule 28.5(c), and all parties have been served.

Daniel Summers
DANIEL C. SUMMERS,
Respondent, Pro Se

SWORN AND SUBSCRIBED BEFORE ME AND IN MY PRESENCE, THIS 19th DAY OF NOVEMBER 1987, by DANIEL C. SUMMERS:

_____
NOTARY PUBLIC

My Commission Expires: My Commission Expires Jan. 14, 1991

11pp

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II. THE DECISION BELOW DECLARING KENTUCKY LAW UNCONSTITUTIONAL THAT PRESCRIBED MANDATORY REVOCATION OF PAROLE UPON A PAROLEE'S CONVICTION OF A NEW FELONY CRIME DOES NOT RAISE IMPORTANT OR UNRESOLVED PROBLEMS..... 3 - 4

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NR._____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

GENE SCROGGY, et al., PETITIONER

versus

DANIEL C. SUMMERS, RESPONDENT

MOTION TO PROCEED IN
IN FORMA PAUPERIS

Comes now DANIEL C. SUMMERS, Respondent Pro Se, and respectfully moves this Court to allow him to proceed in this action in in forma pauperis, pursuant to Rule 46, in that I does not have the funds to pay for filing his Brief in Opposition, paying for photo-copys of my Brief in Opposition and other papers or pleadings, etc.

I state that I was permitted to proceed in in forma pauperis at both the U.S. District Court for the Western District of Kentucky, and on appeal in the Sixth Circuit Court of Appeals and upon which decisions the Petitioner now seeks Certiorari in this Court. I respectfully submit my Affidavit of Indengency in support of this Motion.

WHEREFORE, I respectfully requests this Court to permit me to proceed in this action in in forma pauperis, pursuant to Rule 46.1 to Rule 46.7, inclusive.

Respectfully submitted,
Daniel Summers 81366
DANIEL C. SUMMERS #81 366
Kentucky State Penitentiary
Post Office Box 128
Eddyville, Kentucky 42038

Respondent, Pro se

IN THE UNITED STATES SUPREME COURT

AFFIDAVIT OF INDIGENCY

I, DANIEL C. SUMMERS, state and declare, under penalty of perjury, the following:

1. That my name is Daniel C. Summers, and that I am incarcerated in the Kentucky State Penitentiary located in Eddyville, Kentucky, and whose authorized address is: Post Office Box 128, Eddyville, Kentucky 42038-0128.

2. That I filed a Petition for Habeas Corpus in the Lyon County Court, Eddyville, Kentucky and was granted in forma pauperis status. That this Petition was to exhaust State Remedies in the action now pending in this Court.

3. That I was also granted in forma pauperis status in both the Kentucky Court of Appeals and Kentucky Supreme Court in this action.

4. That I filed a Petition for the Writ of Habeas Corpus in the U.S. District Court for the Western District of Kentucky and was granted in forma pauperis status and that that Court dismissed the Petition and I appealed to the Sixth Circuit Court of Appeals, was granted in forma pauperis, and that Court reversed the District Court's dismissal.

5. That my financial status has not changed since the commencement of this action in 1985, which has now led to this Court and that I still can not pay for the prosecution of this action against the Petitioner.

FURTHER AFFIANT SAYETH NOT.

Daniel Summers 61366
DANIEL C. SUMMERS,
Respondent, pro se

Subscribed to before me and in my presence, by Daniel C. Summers, this 18 day of November 1987.

Laurel Newsome
NOTARY PUBLIC

My Commission Expires: My Commission Expires Mar. 4, 1991.

CERTIFICATE

I certify that the applicant herein has the sum of $8.00 on account to his credit at the Kentucky State Penitentiary institution where he is confined. I further certify that the applicant likewise has the following securities to his credit according to the records of said institution: 11-18-87.

11-16-87
(DATE)

Marie Newman
(Authorized Officer of Institution)

QUESTIONS PRESENTED FOR REVIEW

I.

THE COURT SHOULD DENY THE WRIT UNDER THE DOCTRINE OF THE LAW OF THE CIRCUIT.

II.

THE DECISION BELOW DECLARING KENTUCKY LAW UNCONSTITUTIONAL THAT PRESCRIBED MANDATORY REVOCATION OF PAROLE UPON A PAROLEE'S CONVICTION OF A NEW FELONY CRIME DOES NOT RAISE IMPORTANT OR UNRESOLVED PROBLEMS.

TABLE OF AUTHORITIES

CASE LAW

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NR._____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1977

GENE SCROGGY, et al., PETITIONER

versus

DANIEL C. SUMMERS, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

I accept Petitioner's citation to the opinion below except that the date of Judgment by the Sixth Circuit Court of Appeals was dated JULY 31, 1977, NOT August 31, 1977, which is the date of the Court of Appeals Mandate.(See Petitioner's Appendix, pages A-1 and A-3).

JURISDICTION

I accept Petitioner's statement of Jurisdiction, except as to the date of Judgment as stated above.

STATUTES INVOLVED

The applicable Kentucky Statute involved is reproduced in Petition for Certiorari on page 2.

COUNTERSTATEMENT OF THE CASE

I accept the Petitioner's Statement of the Case.

REASONS FOR DENYING CERTIORARI

THE COURT SHOULD DENY THE WRIT UNDER THE DOCTRINE OF THE LAW OF THE CIRCUIT.

The Sixth Circuit Court of Appeals struct down as unconstitutional a similar Ohio Statute in 1977, and this Court

denied Certiorari. Moss v. Patterson, 550 F.2d 137, 139 (6th Cir.) (per curiam), cert. denied sub nom., Kette v. Moss, 434 U.S. 373 (1977). The Commonwealth of Kentucky failed to file an amicus curie brief, although they had a strong reason to support the views of the Ohio Petitioners against the unconstitutional holding by the Sixth Circuit.

Since this Court denied Certiorari (Kette, supra) the Sixth Circuit Court of Appeals decision in Moss became the law of the Circuit, and ANY State within its Jurisdiction which had the same Statute calling for the automatic revocation of parole, without a revocation hearing, should have recinded their own respective Statute. Instead, Kentucky made no alterations in their own Statute. See K.R.S. 439.352, eff. June 14, 1962.

If Kentucky, like Ohio had recinded its automatic revocation Statute, then it is clear that I would have been afforded a hearing in which I could argue that I was NOT on parole, so therefore could not be revoked in 1983. This, I believe, was just one reason for this Court's decision in Morrissey v. Brewer, 408 U.S. 471, 487-488 (1972), to protect those individuals from arbitrary state revocations of parole, and especially envisioned cases identical to mine in which I have tried to argue that I was NOT on Parole so therefore could not be revoked.

The Petitioner cites Pickens v. Butler, 814 F.2d 237 (5th Cir. 1987) and Black v. Romano, 471 U.S. 606, 105 S.Ct. 2254, (1985) as reasons why the Sixth Circuit was wrong in its Moss opinion. What the Petitioner so conviently leaves out is the plain fact that both Pickens and Black at least had a pre-hearing in which an independant fact finder determined that they were on parole (or probation) and had committed crimes under this disability. They may not have had a final revocation hearing, but they did indeed have a "probable cause" hearing. I did not.

WHEREFORE, since both Pickens, supra, and Black, supra used in support of Petitioner's request for Certiorari were provided with a "probable cause" hearing in which both were found to be under parole supervision when subsequently convicted of new crimes (i.e. violation of parole conditions) then these cases are NOT IN CONFLICT WITH EITHER MORRISSEY, SUPRA, OR MOSS, SUPRA., I respectfully move this Court to Deny Mr. Scroggy's Petition.

II.

THE DECISION BELOW DECLARING KENTUCKY LAW UNCONSTITUTIONAL THAT PRESCRIBED MANDATORY REVOCATION OF PAROLE UPON A PAROLEE'S CONVICTION OF A NEW FELONY CRIME DOES NOT RAISE IMPORTANT OR UNRESOLVED PROBLEMS.

Requireing a State to conduct informal pre-revocation hearings when a person ON PAROLE commits a new felony crime, is subsequently convicted of that new crime would not create any major problems to that State, but would instead meet the terms of Morrissey, supra., by providing due process to the individual prior to his revocation.

As stated in Argument I above, both Pickens and Black, supra, were given an informal hearing. At that hearing, the one thing which the fact-finder MUST determine, is whether the individual is even on parole or under parole board authority, at the time of this "new" crime. If it is found that the individual is under parole authority, then the only Harm committed by this procedure is the few minutes required for this hearing. On the other hand, if it is found that the individual is NOT under the parole authority, then the prejudice is patently and clearly obvious if the parole authorities (fact finder) "revoke his parole" anyway. This is exactly what takes place in an automatic revocation Statute such as Kentucky's, in which there is no informal hearing prescribed or even considered.

In the instant case, I have steadfastly maintained that I was NOT ON PAROLE at the time of the "bad check" crimes. If I could have had even an informal pre-revocation hearing, I would have been able to prove this fact, and I would have also proved that the Commonwealth of Kentucky was in Contempt of the District Court's Order as enumerated in the 1980 Consent Decree to Kendrick v. Bland, 541 F.Supp. 21(W.D.Ky. 1980) which states that the Corrections Cabinet's sub-department agreed to notify EVERY-ONE on parole of their obligations to affirmatively seek their final discharge/restoration of civil rights. During the hearings which ultimately resulted in the Consent Decree being signed, testimony was heard concerning the Kentucky Parole Board's continued disregard of their own Administrative Regulations when it came to parole revocation/petitions for final discharges. The hearings disclosed that the Parole Board consistently had failed to advise its parolees of their obligations; either by their own parole officers or by their neglect in notifying the parolee of their continued obligations after coming off of parole supervision.

The parole guidelines of 1963 to 1980 are not before this Court on this Petition for Certiorari, but if they were, this Court would have to agree that I was not in fact on parole at the time when the bad checks were written and subsequently resulted in my present ten (10) year sentence.

That a parolee has a substantial liberty interest once he is in fact paroled is undisputed. But when an individual is through with his parole requirements the Petitioner evidently is trying to persuade this Court that they can willy-nilly put the ex-parolee right back into prison regardless of the circumstances - whether smitting on the grass or committing a heinous crime.

C O N C L U S I O N

This Court should Deny Certiorari. Both cases relyed on by the Petitioner are not controlling in either the factual situation or point of law in this instant case. I was never given any hearing before having my so-called parole revoked (informal or formal). Someone working in the Parole Commission decided that I was on parole and submitted the necessary papers to the Kentucky State Penitentiary which therefore told me I had had my parole revoked. To state that this could happen again or that some other form of paper mistake could take place is self evident.

WHEREFORE, since an automatic parole revocation procedure, without even the rudimentary due process protections, can result in "mistakes", I respectfully request this Court to Deny the Petition for the Writ of Certiorari.

Respectfully submitted,

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